FILE COPY

Office Supreme Court, U
FILED
OCT 24 1929
CHARLES ELMORE CRO
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 23

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondent.

Reply Brief of Petitioner on Merits

JAMES B. HOWE
DONALD G. GRAHAM
JAMES B. HOWE, JR.
Counsel for Petitioner
856 Stuart Building, Seattle, Washington

SUBJECT INDEX

	Page
THE NEGLIGENCE ISSUE	1
EVIDENCE SHOWS LOCOMOTIVE SET FIRE	8
SUMMARY	13
CONCLUSION	14

TABLE OF CASES CITED

Cincinnati, etc., R. Co. v. South Fork Coal Co., 139 Fed. 528	4
Garrett v. Southern Ry. Co., 101 Fed. 102	5
Great Northern Ry. Co. v. Coats, 115 Fed. 452	6
Hull v. Sacramento Valley R. Co., 14 Cal. 388	7
Lawyers Reports Annotated, 1917 E, page 43	4
Louisville & N. R. Co. v. Bell, 206 Fed. 395	6
McCullen v. Chicago & N. W. Ry. Co., 101 Fed. 66	6, 7
New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367	2
Nitro-Glycerine Case, 15 Wall. 524, 21 L. Ed. 206	1
Northern Pacific R. Co. v. Mentzer, 214 Fed. 10	2, 3
Patton v. Texas & Pac. Ry. Co., 179 U. S. 658	2
Woodard v. Chicago M. & St. P. Ry. Co., 145 Fed. 577	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 23

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Respondent.

Reply Brief of Petitioner on Merits

THE NEGLIGENCE ISSUE

Respondent's brief gives considerable attention to the *Nitro-Glycerine Case*, 15 Wall. 524, 21 L. ed. 206, but respondent's comments do not require any answer

because petitioner's opening brief, pages 19-23, demonstrated that this case is not in point.

Respondent's brief concludes by stating:

"Plaintiff (petitioner) is asking the court to reverse a rule that has been in effect in this court and in Federal Courts generally, at least since the decision in the *Nitro-Glycerine case, supra,* more than fifty years ago."

This gratuitous conclusion is not supported by any authority. On page 29 of its opening brief petitioner said:

"Petitioner has not found, and hereby challenges the respondent to produce, a single federal case in which the origin of the fire has been proved, where the plaintiff, in the absence of any showing of care by the railway company, has been denied the privilege of having the jury draw the inference that the railway company was guilty of negligence."

Respondent has not met the challenge or attempted to do so and upon the point under discussion has cited only four cases not dealt with in petitioner's opening brief. These four cases are:

New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367.

Patton v. Texas & Pac. Ry. Co., 179 U. S. 658.

Northern Pacific Ry. Co. v. Mentzer, 214 Fed. 10, 22.

Woodard v. Chicago M. & St. P. Ry. Co., 145 Fed. 577.

The two cases decided by this court were cases wherein railway company employes were attempting to recover from their employers for personal injuries. In each case the defendant made an explanation. Neither case concerned a fire and neither case is in point.

There is nothing in the holding of *Northern Pacific Ry. Co. v. Mentzer* hostile to petitioner's contention. This case merely holds that it is incumbent upon the plaintiff to establish negligence. Petitioner and respondent are in accord upon this but differ in their contentions as to how negligence may be established. In this case the defendant made an explanation. The jury found for the plaintiff and the judgment entered upon its verdict was affirmed upon appeal.

In *Woodard v. Chicago M. & St. P. Ry. Co.* the defendant railway company introduced evidence and made such a strong and satisfactory showing of due care that the court held that the statutory presumption of negligence had been overcome and directed a verdict in the defendant's favor. Petitioner has never contended that the presumption of negligence raised by proof of the setting of the fire is conclusive. Petitioner has always stated that such presumption is only *prima facia* and conceded that it could be overcome by sufficient evidence of due care. This case, like the

Nitro-Glycerine case, is not in point because in each case the defendant made an explanation and a sufficiently strong explanation to overcome any *prima facia* presumption of negligence.

The only portion of the opinion in *Cincinnati N. O. & T. R. R. Co. v. South Fork Coal Co.*, 139 Fed. 528, which aids respondent or supports the proposition for which it was cited (by the Circuit Court of Appeals in the case at bar) is *dictum*. Respondent concedes this, at page 16 of its brief, but suggests that the *dictum* is correct because "sparks escape from locomotives in the normal and customary operation of railroads." Sparks do escape in the normal and customary operation of railroads *but they seldom escape in such quantities or volume as to cause damage in the absence of negligence.* The italicized portion of this statement is supported by the cases cited on page 37 of petitioner's opening brief. Respondent's brief does not mention those cases, or the doctrine of *res ipsa loquitur*, and does not allude to quotation from page 43 of L. R. A. 1917 E (see page 40 of petitioner's opening brief) which emasculates the contention that a *prima facie* presumption of negligence can not exist unless the accident in question is of such a nature that it negatives the possibility of a non-negligent cause.

In the case at bar the Circuit Court of Appeals relied chiefly upon *Garrett v. Southern Ry. Co.*, 101 Fed. 102. Petitioner's opening brief (pages 23, 24 and 28) endeavored to show that this case did not support the court's holding. Respondent's brief (page 15) states that in the *Garrett* case "evidence to show negligence was introduced, and it was only because it was introduced, that the case went to the jury." Counsel for petitioner have read and re-read the opinion in the *Garrett* case and have failed to find any reference to any act of negligence proved by the plaintiff.

Respondent points out that the opinion, in the Garrett case, said:

"It may be that evidence as to approved methods for preventing emission of dangerous sparks may justify an inference of fact that the fire could not have been thus communicated without negligence. This was the charge of the court."

Grasping at a straw, respondent suggests that because of this language it is essential to introduce evidence that a fire is not likely to occur without negligence. Does respondent wish a plaintiff to prove what is a matter of common knowledge? If so, why did not respondent criticize, or produce authority contrary to, the cases quoted from on page 37 of petitioner's brief, to-wit, the cases holding that such proof is unnecessary?

Respondent's brief quotes from *Louisville & Nashville R. R. Co. v. Bell*, 206 Fed. 395, in spite of the fact that petitioner's brief (page 29) pointed out that the court found that there was evidence tending to show that the railway company's locomotive was negligently operated and specifically refused to pass upon the question of whether or not a case sufficient for the jury would have been made out had such evidence been lacking.

Respondent contends that *McCullen v. Chicago & North Western Ry. Co.*, 101 Fed. 66, is not in point upon the question of the presumption of negligence because, respondent says, in that case there was evidence of negligence. Thayer, J., who delivered the opinion, based the holding squarely upon the rule that proof of the origin of the fire created a presumption of negligence. The learned judge did not even hint that he thought the plaintiff had proved a specific act of negligence (the evidence showed no act of negligence) and in the later case of *Great Northern Railway Company v. Coats*, 115 Fed. 452, Thayer, J., showed that he entertained the view that proof of a specific act of negligence was unnecessary, when he said:

"The testimony in question not only created a presumption of negligence on the part of the defendant company, but in so far as it showed the company had allowed combustible material to accumulate on its

right-of-way, it established a specific act of negligence."

In the *McCullen* case the mill destroyed by fire was 302 feet distant from the tracks over which the locomotive alleged to have caused the fire passed. Respondent's argument that negligence was shown in the McCullen case is scarcely consistent with respondent's argument, in the case at bar, that there was no evidence from which the jury could infer that respondent's locomotive set fire to the warehouse only a few feet away from the railway tracks.

Respondent's brief does not mention *Hull v. Sacramento Valley Railroad Co.*, 14 Cal. 388, (page 22 of petitioner's opening brief) which is favorable to petitioner's contention and in which Field, J., concurred. Respondent's brief does not mention any of the six federal cases (except the *McCullen* case) discussed under the heading "Favorable Federal Cases" on pages 14 to 18 of petitioner's opening brief. Respondent's brief quoted from the opinion of the District Court and the Circuit Court of Appeals *in the case at bar* but did not respond to petitioner's challenge to produce a single federal case of like holding. Respondent still asserts that it relies upon the federal court rule but petitioner has been unable to find, or induce respondent to produce, any federal case showing the rule to be what respondent contends it is.

Respondent admits (brief page 19) that the rule in the State of Washington is in accord with petitioner's contention. Respondent did not challenge petitioner's statement that the rule in England is the same or petitioner's abundant citations showing that the great weight of authority supports petitioner's view. Respondent's brief ignores the maxim *res ipsa loquitus*. Respondent does not openly admit abandoning the support of the legal proposition announced by the Circuit Court of Appeals but respondent shifts its position and invites this court to read all the evidence in the case and decide that the Circuit Court of Appeals was wrong in holding that the evidence was sufficient to go to the jury upon the question of whether or not the railway company set the fire.

Locomotive Set Fire

Petitioner believes this court will not deem it necessary to review the correctness of the holding of the Circuit Court of Appeals that the evidence was sufficient to warrant the drawing of the inference that sparks from respondent's locomotive caused the fire. Although there is room for a difference of opinion as to how the fire was caused it certainly can not be said that petitioner's evidence is insufficient to warrant the drawing of the inference that respondent's locomotive caused the fire.

In case it should decide to review the evidence this court should not be misled by the statements in respondent's brief that there was no grade at Badger. The record shows that there was a stiff grade (R. pages 59, 86, and 91). The Circuit Court of Appeals so interpreted the evidence, saying in its opinion, "as the railroad approaches Badger there is a heavy uphill grade" (R. 116). "Two locomotives were pulling the long train up a stiff grade" (R. 118). Even if the grade ended three-quarters of a mile west of Badger, which respondent seems to think is the case, the locomotives would still be pulling some of the cars upgrade when they (the locomotives) reached Badger because they hauled 70 cars and the train must have been nearly a mile long. It is odd that respondent did not show the grade upon its map (defendant's exhibit A-1 attached to respondent's brief) if it wished to make such a point of the matter.

If the evidence is to be reviewed it should be construed as favorably as possible to petitioner and all justifiable inferences which can be drawn from it should be drawn in petitioner's favor. The following summary, considered in connection with those portions of the evidence already referred to, gives a fair account of the case proved by petitioner.

The warehouse which contained the wool and sacks destroyed by the fire was only a few feet from the

main double track line of respondent's railway. (See defendant's Exhibit A-1, the map attached to respondent's brief). Said warehouse had a sloping shingle roof (R. 91).

The tracks run uphill as they approach Badger from the north so that an eastbound train travels upgrade (R. 86, 91). The grade is quite stiff (R. 59). The trains generally pull quite hard (R. 59, 91). Because of the heavy grade the trains are sometimes divided between Kiona and Badger (R. 91).

Petitioner's witness Fernandes, who is a sheepherder, testified that when trains climbed this grade he noticed that they emitted a great deal of smoke and he heard puffing. When asked if he saw anything besides smoke the witness answered, "Well, I didn't see anything much until this summer. (By this he probably meant the summer of 1927—the fire occurred in May, 1926). I kind of watched this summer and I saw some sparks coming out of the engine. * * * I never paid attention before." (R. 59, 60.)

The country in which the warehouse was located was very dry (R. 71). Except for sagebrush and bunch grass, little that was green or that had life to it grew there (R. 51 and 97). However, weeds grew all over that part of the country (R. 71), and the witness Fernandes testified that he had seen weeds, and

also Russian thistles (R. 79), at the Badger warehouse when the wind was blowing (R. 71 and 72). The witness Ben Agor was not at Badger on the day of the fire, but was thoroughly familiar with the vicinity and the surrounding country (R. 96). He stated that he had seen weeds and papers about the warehouse when the wind was blowing (R. 90) and had noticed thistles blowing across the right-of-way at times (R. 96). He also stated that sometimes there were severe winds at Badger (R. 96).

On the day of the fire, at noon, the wind was blowing from the west to the east (R. 51), that is, away from the tracks and toward the warehouse. The evidence does not show that the wind had changed or died down at the time the fire occurred. On that day the warehouse contained 50 or 60 sacks of grain and about 200 sacks (or 70,000 pounds) of wool, which was Peter Agor's 1925 and 1926 crop. (R. 54, 75, 89, 99.)

About 9:45 or 9:50 p. m. (R. 84) one of respondent's trains, coming over the upgrade from Kiona (R. 86), passed the Badger station going east. The train was a double-header, which hauled seventy freight cars (R. 85). The fireman upon one of the engines saw no fire at Badger when the train passed through (R. 85). The witness Fernandes, who lived at Badger (R. 48), was awakened about 10:00 p. m.,

and then discovered the warehouse to be on fire at its southwest corner (R. 56), which was the corner closest to the railway tracks. There "was quite a bit of fire" (R. 56), too much to attempt to extinguish (R. 57). It appeared to have started from the ground (R. 57) and had not, when first observed, reached the roof (R. 56). Soon after Fernandes first observed the fire the whole warehouse quickly became a mass of flames (R. 77).

When the train which had passed Badger reached the town of Vista, some fifteen or twenty minutes later (R. 85), the fireman who had seen no fire when the train went through Badger looked back, saw an illumination in the sky and said to the engineer, "It looks like the whole town of Badger is afire" (R. 85).

No one except Fernandes and two of respondent's employes lived within a mile and a half or two miles of Badger (R. 52, 54). Fernandes was asleep and there was no fire in his shack when the warehouse caught fire (R. 55). The evidence disclosed no fire in the shack of either of the railway employes. No other person had been seen at the warehouse on the day of the fire (R. 52, 82).

The fire in the locomotive which passed is the only fire which the evidence disclosed. If the warehouse was not ignited by sparks setting fire to its outside or

combustible material surrounding it, as the evidence indicates, the cause of the fire remains wholly unexplained.

On pages 8 to 10 of its brief respondent makes an argument to this court which should have been saved for a jury. In view of petitioner's evidence it is useless to cite authority to show the correctness of the holding of the Circuit Court of Appeals upon the question of the origin of the fire. Abundant authority was presented to that court when the matter was submitted to it and the court reviewed the evidence carefully, together with the cases bearing upon it, and, it is submitted, came to a correct conclusion upon this point.

SUMMARY

When a plaintiff, in a railway fire case, shows that the property damaged by fire was adjacent to railway tracks the railway company asserts that for that reason it could easily have been ignited without negligence upon the defendant's part and, therefore, that a nonsuit should be granted because of the failure to sufficiently prove negligence. When the property damaged by fire is shown to have been a great distance from the railway tracks the railway company asserts that the evidence is insufficient to show that

it could have set the fire. The stronger the plaintiff's case is upon the one point the weaker it is upon the other. There should be some way of passing safely between Scylla and Charybdis notwithstanding respondent's vacillating argument to the contrary.

The railway companies have a sufficient advantage, in being in possession of the evidence, and should not be permitted to refuse to make an explanation when possibly guilty of gross negligence but the plaintiff lacks ability to prove this.

Conclusion

It is respectfully submitted that the Circuit Court of Appeals correctly held that petitioner's evidence warranted the jury inferring that respondent set the fire but incorrectly held that no inference of negligence could be drawn therefrom.

JAMES B. HOWE,
DONALD G. GRAHAM,
JAMES B. HOWE, JR.,
Counsel for Petitioner.

ff's
the
'ely
re-

age,
not
hen
ıtiff

ourt
ence
. the
egli-

ıer.

FILE COPY

FILED
JAN 31 192
CHARLES ELMORE CR
C

IN THE

Supreme Court of the United States

October Term, 1928.

No. [redacted] 23

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,
Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

L. B. daPONTE,
ARTHUR E. SIMON,
D. F. LYONS,
Counsel for Respondent,
909 L. C. Smith Building,
Seattle, Washington.